

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE ESTATE OF KABASINSKAS

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IN RE ESTATE OF FREDERIC KABASINSKAS, DECEASED.

DAVID KABASINSKAS, APPELLANT,

V.

LENORE KABASINSKAS, APPELLEE.

Filed May 4, 2010. No. A-09-698.

Appeal from the County Court for Douglas County: MARCENA M. HENDRIX, Judge.
Reversed and remanded for further proceedings.

David A. Domina and Mark D. Raffety, of Domina Law Group, P.C., L.L.O., for
appellant.

Larry R. Demerath, of Demerath Law Office, for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

David Kabasinskas appeals from the dismissal of his petition which sought removal of Lenore Kabasinskas as the personal representative (PR) of the estate of Frederic Kabasinskas. Looking only at the face of David's petition, we conclude that he alleged sufficient factual allegations which, if true, could constitute cause for removal of Lenore if the county court so finds in its exercise of sound judicial discretion. Accordingly, we reverse, and remand for further proceedings.

II. BACKGROUND

The decedent died in a motor vehicle accident on Interstate 80 on September 20, 2008. At that time, his domicile was in Colorado. He left no will. The decedent's heirs include his second

wife, Lenore; his sons, David and Richard Kabasinskas; and his daughter, Irene Kabasinskas. Lenore is the stepmother of David and Richard and the mother of Irene.

On May 21, 2009, David filed a “Petition for Formal Proceedings in Intestacy, Determination of Heirs, Removal of Informally Appointed PR, and Appointment of PR in Formal Proceedings.” David filed his petition in the county court for Douglas County. In his petition, he alleged that venue was proper because the decedent was a nonresident at the time of his death, but in the same paragraph, David states that venue in Douglas County is not proper but that Douglas County is where Lenore initiated proceedings. David’s petition further alleged in part:

5. Lenore . . . , the decedent’s wife, has a statutory priority for appointment as PR. However, she committed irregularities in connection with the initiation of these proceedings, and the administration of the decedent’s estate and claims for his wrongful death before, and when, she initiated these proceedings. She did so in at least these respects, which are now known, and perhaps others yet to be discovered:

5.1. She initiated these proceedings only after [David] made known his objection to her service and his objection to her conduct of negotiations in Texas, without notification to or information from [David] or his brother concerning their father, the relationship they had with their father, or their damages relating to his wrongful death.

. . . .

5.4. She, directly or through her counsel, refused to communicate with [David] and his counsel after [David] objected to the conduct of premature settlement negotiations, to occur in another state without input from [David] or his brother.

5.5. She represented, falsely, in her Petition for Informal Probate of Intestate Estate the following facts:

5.5.1. The decedent had Douglas County, Nebraska, property, a wrongful death action at the time of his death, or the PR had such an action, when there is no action in Douglas County.

5.5.2. She had not received a demand for notice, and, while technically, no such notice had been required, she was aware of [David], his position, the identity of his Nebraska counsel, and his circumstances, but she failed to disclose these matters in her application.

5.5.3. She represented that no bond was required “because all interested parties agree to waive,” though no one contacted [David] or his brother to ascertain whether they would waive bond, and this statement is false.

5.5.4. [Lenore] incorrectly represented the address of decedent[’]s surviving son, Richard, in her Application for her appointment as PR.

5.6. No formal notice of the appointment of Lenore . . . as PR was given, on a timely basis, to [David] or other interested persons.

6. [David] is informed that Lenore . . . was appointed as [PR] of the decedent’s estate in proceedings in Weld County, Colorado, though he was not timely, formally informed of these proceedings. [David] is also aware [Lenore] improperly completed the Application for Informal Appointment of [PR] in the Colorado action as [Lenore] represented to the court in paragraph 10 of that document that “All of the decedent’s

surviving issue are issue of surviving spouse . . .” which we know is incorrect as [David] and his brother Richard . . . are biological sons of the decedent but step-sons of [Lenore]. [David] is also now aware of the registrar’s issuance of a statement of informal probate, and informal appointment of Lenore . . . as [PR] in this case. He challenges that appointment, requests that it be set aside, and seeks appointment of a separate, distinct PR.

In David’s petition, he first nominated an Omaha attorney to serve as PR and he next nominated himself. Alternatively, David requested the appointment of a special administrator to take control of the decedent’s wrongful death case, hire counsel, and ensure that any recovery made be divided in the manner described in Nebraska’s wrongful death act. David also alleged that “[n]o bond is believed required because, to [David’s] knowledge, the estate has no assets.”

Lenore subsequently filed a motion to dismiss or make more definite and certain. She alleged that David’s petition failed to state a claim upon which relief may be granted and should be dismissed under Neb. Ct. R. Pldg. § 6-1112(b)(6). Following a hearing, the county court entered an order granting Lenore’s “motion to strike” and dismissing the petition for failure to state a claim upon which relief may be granted.

David timely appeals.

III. ASSIGNMENTS OF ERROR

David alleges that the county court erred in (1) dismissing his petition to nominate either himself or the attorney as PR or to appoint a special administrator to take control of the decedent’s wrongful death proceedings, (2) finding David had not alleged sufficient facts to challenge the appointment of Lenore as PR, and (3) failing to set for a full evidentiary proceeding David’s petition to nominate himself or the attorney as PR or to appoint a special administrator.

In his brief on appeal, David makes no argument about the allegations contained in paragraphs 5.2 and 5.3 of his petition. Accordingly, we do not consider those paragraphs on appeal. To be considered by an appellate court, an alleged error must be both specifically assigned and *specifically argued* in the brief of the party asserting the error. *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009).

IV. STANDARD OF REVIEW

Because a § 6-1112(b)(6) motion tests the legal sufficiency of the complaint, not the claim’s substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007). Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 754 N.W.2d 607 (2008). An appellate court reviews de novo a lower court’s dismissal of a complaint for failure to state a claim. *Id.* When analyzing a lower court’s dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint’s factual allegations as true and construes them in the light most favorable to the plaintiff. *Id.*

When matters outside of the pleadings are presented by the parties and accepted by the trial court with respect to a motion to dismiss under § 6-1112(b)(6), the motion shall be treated as a motion for summary judgment and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute. See *Doe, supra*. Here, the court's order stated in part that it was granting Lenore's motion to dismiss "after listening to the statements of [c]ounsel, reviewing certain evidence, and being otherwise fully advised in the premises." After reviewing the bill of exceptions from the hearing on the motion to dismiss, we note that no evidence was offered, but that Lenore's counsel requested the court to "take judicial notice, if there was notice published in the newspaper, that was sent out by affidavit, to all interested parties, including [David's counsel's] law firm." The county court stated, "Okay." A court may take judicial notice of matters of public record without converting a § 6-1112(b)(6) motion to dismiss into a motion for summary judgment. *Doe, supra*. Accordingly, we apply the standard of review applicable to an order granting a motion to dismiss.

V. ANALYSIS

1. JURISDICTION

Lenore contends in her brief that we lack jurisdiction because David failed to post a supersedeas bond. Earlier, we denied her motion to strike the appeal or to dismiss, which alleged that we lacked jurisdiction because there was not a final order and because David did not file a supersedeas bond as required by Neb. Rev. Stat. § 30-1601 (Reissue 2008). Both parties cite *In re Estate of Sehi*, 17 Neb. App. 697, 772 N.W.2d 103 (2009), to support their respective positions. In that case, involving an appeal from district court arising solely under the probate code, we did not dismiss the appeal for lack of jurisdiction, but, rather, sustained a motion to require the appellants to file a supersedeas bond. In doing so, we set the amount of the bond to be required. However, in the case before us, there has been no similar motion specifically requesting a supersedeas bond. While Lenore has asserted that we lack jurisdiction and has made suggestions regarding the amount of a bond if one was requested, she has never expressly requested that we order the posting of a supersedeas bond. We also note that in *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007), involving trust administration proceedings, the appellants filed a supersedeas bond, but not within 30 days of the county court's final order. This court overruled the appellees' motion for summary dismissal but ordered supplemental briefing on the issue of whether the appeal should be dismissed. The Nebraska Supreme Court subsequently moved the case to its docket, quoted § 30-1601(3), and stated:

We view the authority to dismiss an appeal conferred by this statute as discretionary in nature, in that it directs that a court "may" take such action as is just. Generally, when the word "may" is used in a statute, "permissive or discretionary action is presumed." Here, the record reflects that the appellants had initiated but not completed efforts to obtain a supersedeas bond within the 30-day period. The bond was actually filed 46 days after the entry of judgment. There is no indication that the late filing resulted in prejudice or delay.

We conclude that dismissal would not be just under these circumstances.

In re Trust Created by Isvik, 274 Neb. at 532, 741 N.W.2d at 644-45.

In re Estate of Sehi, supra, and *In re Trust Created by Isvik, supra*, support our conclusion that David's failure to file a supersedeas bond in this case does not deprive us of jurisdiction to consider the appeal.

2. DISMISSAL OF PETITION

David argues that his petition outlined facts that would have merited removal of Lenore as PR and, thus, that the county court erred in dismissing his petition.

Cause for removal of a PR exists when (1) removal would be in the best interests of the estate, (2) it is shown that a PR or the person seeking his or her appointment intentionally misrepresented material facts in the proceedings leading to his or her appointment, (3) the PR has disregarded an order of the court, (4) the PR has become incapable of discharging the duties of his or her office, or (5) the PR has mismanaged the estate or failed to perform any duty pertaining to the office. See Neb. Rev. Stat. § 30-2454(b) (Reissue 2008). We note that nothing in David's petition could be construed to allege that Lenore disregarded an order of the court or that she had become incapable of discharging the duties of a PR. We now examine the arguments addressing David's petition, accepting all factual allegations of the petition as true, to determine whether he stated facts which could constitute cause for removal of Lenore as PR.

(a) 5.1 and 5.4.

These allegations--addressing conduct of negotiations in Texas, attempting to control the proceedings, and purporting to be a PR--appear to address Lenore's actions prior to the commencement of Nebraska proceedings leading to her appointment as PR in this state. Neither paragraph alleges facts constituting a cause for removal.

(b) 5.5.1.

David alleged that Lenore falsely represented in her petition for informal probate that the decedent had Douglas County property--a wrongful death action--at the time of his death or the PR had such an action, when there was no action in Douglas County. Accepting the factual allegations as true, this allegation could state a cause for removal because it could be construed as a misrepresentation of a material fact leading to Lenore's appointment and, if no such property exists in Douglas County where Lenore instituted proceedings and depending upon all of the facts and circumstances established by the evidence, her removal could be in the best interests of the estate.

(c) 5.5.2.

David alleged that Lenore falsely represented that she had not received a demand for notice and that she failed to disclose in her application that she was aware of David, his position, and the identity of his counsel. However, David concedes in this same paragraph that no such notice was required. Thus, even if Lenore's representation was false, it is not a material fact. However, her failure to disclose David, his position, and his counsel could support a finding that removal of Lenore as PR may be in the best interests of the estate.

(d) 5.5.3.

David alleged that Lenore falsely represented that no bond was required because all the interested parties agreed to waive it even though no one asked David or Richard if they would waive bond. However, David's own petition admits that no bond is required. This does not supply a ground for removal.

(e) 5.5.4.

David next alleges that Lenore falsely represented the address of Richard in her application for appointment as PR. Even if Lenore did so intentionally, in the absence of an allegation that Richard would have objected to Lenore's appointment, Richard's address does not appear to be a material fact in the proceeding leading to Lenore's appointment.

(f) 5.6.

David alleged that no formal notice of Lenore's appointment as PR was timely given to David or other interested persons. Depending upon the totality of the evidence presented, this allegation could show either that removal of Lenore as PR would be in the best interests of the estate or that Lenore mismanaged or failed to perform a duty pertaining to the office of the PR.

(g) 6.

David alleges that Lenore falsely stated in her application for informal appointment of a PR in Colorado that all of the decedent's surviving issue were issue of Lenore. David and Richard are Lenore's stepchildren. Under § 30-2454(b), cause for removal exists "if it is shown that a [PR] or the person seeking his [or her] appointment intentionally misrepresented material facts in the proceedings leading to his [or her] appointment." With respect to proceedings in Nebraska to remove a PR previously appointed in a Nebraska proceeding, we understand the words "the proceedings leading to his [or her] appointment" to refer solely to the Nebraska proceedings. In our view, this language does not extend the power of a Nebraska probate court to remove a Nebraska PR for conduct related to a separate appointment proceeding in another state, at least where the conduct occurred prior to the commencement of the Nebraska appointment proceedings. Thus, this allegation of David's petition did not allege facts constituting cause for Lenore's removal as PR.

3. RESOLUTION

As set forth above, in looking only at David's petition, it alleged facts which, if true, could constitute cause under § 30-2454(b) to remove Lenore as the PR. Accordingly, the county court erred in dismissing the petition under § 6-1112(b)(6).

However, we emphasize that just because certain factual allegations, if proved, may fit within the statutory grounds for removal, that does not necessarily mean that Lenore should be removed as PR, and we express no opinion on the question of whether such removal should be ordered. Such a determination will need to be made by the county court in its exercise of sound judicial discretion following an evidentiary hearing. See, e.g., *Moss v. Eaton*, 183 Neb. 71, 157 N.W.2d 883 (1968) (stating there must be measure of judicial discretion in determining whether

particular conflict of interest is sufficiently serious, adverse, or antagonistic to prevent appointment or compel removal of executor).

Because we are reversing and remanding the matter for further proceedings, we need not consider David's other assigned errors. See *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

VI. CONCLUSION

We conclude that the county court erred in dismissing David's petition under § 6-1112(b)(6), because the petition contained factual allegations which, if true, could constitute grounds for removal of the PR under § 30-2454(b). We express no opinion whether the county court, in the exercise of its sound judicial discretion after an evidentiary hearing, should remove Lenore as PR.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.